No. 75-1900

In the Supreme Court of the United States

OCTOBER TERM, 1975

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Petitioner,

vs.

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

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vs.

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL,
Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Continental Illinois National Bank and Trust Company of Chicago petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is appended as Appendix A. The unreported opinion of the United States District Court for the Northern District of Illinois is appended as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

To what extent, if any, does the operation of electronic funds transfer machines by national banks off their premises constitute branch banking within the meaning of 12 U.S.C. § 36(f).

STATUTES INVOLVED

Federal Statutes:

12 U.S.C. § 36(f)
12 U.S.C. § 36(c)

Illinois Statutes:

Ill. Rev. Stat. ch. 16½, § 102 (1975)
Ill. Rev. Stat. ch. 16½, § 105(11) (1975)
Ill. Rev. Stat. ch. 16½, § 106 (1975)

The relevant statutes are cited in full in Appendix C.

STATEMENT

Electronic funds transfer or "EFT" is a rapidly evolving new segment of the national payments mechanism made possible by adapting modern computer and communications technologies to funds transfers. It is the most significant innovation in banking payment services since development of the checking system. EFT accelerates funds transfers and dispenses with paper and manual processing which increasingly burden the traditional paper-based payments and clearings system. EFT uses

computer tapes and electronic impulses in lieu of checks to transfer social security benefits, government and business payrolls and other high-volume, recurring payments directly to the recipients' accounts at financial institutions. More than 35 automated clearing houses—metropolitan, regional and national—are or by the end of 1976 will be in operation for clearing EFT transactions involving debits and credits between government, business, individual and other accounts maintained at different financial institutions throughout the country.

This case involves the retail aspect of this phenomenon. Electronic terminals through which individuals may be accorded direct access to their accounts at financial institutions, or give electronic directions pertaining to such accounts, are already spreading rapidly as banks, savings and loan associations ("S&Ls"), credit unions, national credit card companies, retailers and other business entities increasingly turn to such terminals to offer EFT to their customers.

Petitioner, Continental Illinois National Bank and Trust Company of Chicago ("Continental") is a national banking association organized and operating under the National Bank Act (12 U.S.C. §§ 21 *et seq.*) with its main banking premises in Chicago, Illinois. Continental has installed, at sites apart from its main banking premises, two unmanned and 62 point-of-sale ("POS") electronic terminals each connected by telephone wire to a Continental main computer located at its banking premises. The unmanned terminals are located in the city of Chicago at a railroad station and the interior mall of an office building complex; the POS terminals are located in the stores of a supermarket chain in the metropolitan Chicago area, primarily in suburbs surrounding Chicago. Through this system, activated by insertion of a customer's magnetic "key"

card into an electronic terminal (hereinafter sometimes called "CBCT"),* a customer can, among other things, withdraw funds from his savings, checking or credit card account, transfer balances between such accounts, cause funds to be credited to such account and make payments to Continental or to third parties.

Upon insertion of the "key" card in the terminal, electronic messages pass between the terminal and Continental's main computer where the requested transaction is processed. The main computer locates the customer's file and checks the identification number which the user taps in on a keyboard at the terminal against a secret identification number stored in the main computer. The customer also taps in on the keyboard information concerning the requested transaction. The eligibility of the customer to complete the transaction, bank authorization thereof, debits and credits to customer accounts and verification procedures also take place at the main computer or elsewhere at the bank. Memoranda of each transaction are delivered to the customer at the terminal. Arrangements for the customer to avail himself of EFT and the accounts and services included therein are made at the bank or by mail.

Because verification of the identity of a customer depends solely on possession of the "key" card and the user's knowledge of the customer's secret identification number, banks impose limitations on EFT withdrawals from savings, checking or credit card accounts. Continental permits one withdrawal per 24-hour period limited in amount to $100.

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* Electronic terminals (unmanned and POS) maintained by banks are known as Customer Bank Communication Terminals or CBCTs.

Unmanned terminals are operated by the customer. In addition to facilitating communications between the customer and the bank, unmanned terminals dispense cash in prepackaged $25 packets and have a drawer for insertion of cash or checks for retrieval by the bank.

POS terminals are operated by employees of the store at which they are located. When groceries or cash are delivered by the store to the customer, Continental is instructed by POS terminal to debit a specified account of the customer and credit an account of the store at Continental. Cash or checks delivered by the customer at the site of the POS terminal become the property of the store; as consideration, the store employee instructs Continental to debit the account of the store and credit a specified account of the customer with Continental.*

On June 20, 1975, the Illinois Commissioner of Banks and Trust Companies ("Illinois Commissioner") sued to enjoin Continental from maintaining these CBCTs, alleging that CBCTs are branches under 12 U.S.C. § 36(f) and are prohibited to national banks in Illinois by 12 U.S.C. § 36(c). The District Court held that unmanned or POS terminals used in connection with (i) cash withdrawals from a customer's savings and checking accounts at Con-

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* For a detailed description of Continental's CBCTs and a more complete description of EFT, see Stipulation of Facts attached as Appendix B to Brief in Support of Continental Bank's Motion for Summary Judgment in the District Court; Affidavits of William D. Plechaty attached as Appendices D and VII to Brief in Support of Continental Bank's Motion for Summary Judgment and November 12, 1975 Memorandum of Continental Bank in the District Court, respectively; and Affidavits of Dean Donald P. Jacobs attached as Appendices C and IV to Brief in Support of Continental Bank's Motion for Summary Judgment and November 12, 1975 Memorandum of Continental Bank in the District Court, respectively.

tinental, and (ii) payments of a customer's indebtedness to Continental, are not "branches" under 12 U.S.C. § 36(f). It further held that terminals, whether unmanned or POS, used in connection with (i) transfers between a customer's savings and checking accounts, or from his credit card account to his checking account, at Continental, (ii) deposits to such a savings or checking account or (iii) cash advances to a customer pursuant to an overdraft or charge-card line of credit, are "branches" under 12 U.S.C. § 36(f). The Court of Appeals held all CBCT functions to be branching under 36(f), reversing the District Court as to cash withdrawals and payments of customer indebtedness and affirming as to all other functions.

REASONS FOR GRANTING THE WRIT

At issue here is whether after a period of 150 years during which banks have been the heart of the national payments mechanism—initially through issuance of bank notes and then as the exclusive supplier of demand deposit accounts--the participation of national banks in the nation's new electronic payments mechanism can be foreclosed or restricted through application of branching laws even as to electronic funds transfer in states where this is unnecessary to preserve competitive equality between state and national banks.

The status of electronic terminals under the Federal branching laws is significant for national banks in all states. This is true not only where the state's statute law relating to state-chartered banks prohibits, or limits the number or location of, branches and expressly treats electronic terminals as branches. It is also true where the state's statute law (i) contains such a prohibition or limitation of branches but is silent as to the branch status of electronic terminals; (ii) permits statewide branching whether or not silent as to the branch status of electronic terminals; or (iii) expressly provides that electronic terminals are not branches whether or not imposing any limitations or requirements as conditions to maintaining electronic terminals.

The Federal branch banking laws impose requirements as to minimum capital and the processing of a branch application with the Comptroller of the Currency upon all facilities of national banks deemed to be branches under Federal law. 12 U.S.C. §§ 36(d), 51. Thus, even in a state under whose law CBCTs are not branches for state banks or no branch requirements are imposed on CBCTs of state banks, the Federal minimum capital and branch application requirements would apply to national bank CBCTs if deemed branches under 36(f).

Moreover, read literally, the Federal branch banking laws prohibit a national bank from establishing or operating a branch unless the establishment and operation of such a branch is permitted to state banks by the express law of the state in question. 12 U.S.C. § 36(c); see also *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966) (*"Walker Bank"*). Thus, where state banks are permitted—not by statute but by administrative interpretation or enforcement practices of state banking authorities—to establish and operate facilities of a kind deemed to be branches for national banks under Federal law, the right of a national bank to establish and operate identical facilities is at least problematical under the decision below. Even if neither state nor Federal banking authorities would attempt to prevent a national bank in such a state from doing so, a competitor might initiate action.

In short, a holding that electronic terminals are branches for national banks significantly affects all national banks and the national banking system irrespective of the branch requirements, and the branch status of electronic terminals, for state-chartered banks under the law of the state where the terminals are located.

Litigation testing the applicability of the Federal branching laws to EFT services is pending or has been decided in at least 10 courts throughout the country. Although the court of appeals below, as well as the court of appeals in *Independent Bankers Ass'n of America* v. *Smith*, No. 75-1786 (D.C. Cir., March 23, 1976) (*"IBAA"*) and two district courts in other circuits,* have held elec-

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* *State of Ohio ex rel. O'Donnell* v. *Smith*, No. C-1-75-153 (S.D. Ohio, May 10, 1975); *State of Missouri ex rel. Kostman* v. *First National Bank in St. Louis*, No. 75-113 C (1) (E.D. Mo., Nov. 14, 1975), *appeal docketed*, No. 76-1056, 8th Cir., Jan. 21, 1976.

tronic funds transfer machines and all of their functions to be branching under the McFadden Act provisions of the national banking laws (12 U.S.C. § 36), two district courts have held some or all of such EFT services not to be branching thereunder.*

1. The Federal definition of "branch" in 12 U.S.C. § 36(f) (hereinafter "36(f)") provides in relevant part:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."

The application of this definition to specific EFT functions of CBCTs presents novel and difficult questions of Federal banking law which, by reason of the significance of EFT to banking and the national payments mechanism, ought to be resolved by this Court.

The Federal branching laws do not expressly encompass a number of the CBCT functions, and there is no reason to stretch them to deprive the public of the benefits of the new technology.

An EFT cash withdrawal transaction is not the paying of a check under 36(f). As the District Court below held, the insertion of a card into an electronic terminal to withdraw $25 packets of cash (up to $100) from a customer's

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* *State of Oklahoma ex rel. State Banking Board* v. *Utica National Bank and Trust Company*, No. 75-C-318 (N.D. Okla., Dec. 23, 1975), *appeal dismissed per stipulation* (holding that CBCTs are not branches with respect to any of their functions); *State of Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 394 F. Supp. 979 (D. Colo. 1975), *appeals docketed*, Nos. 75-1523, 75-1611, 75-1612, 10th Cir., July 17, 1975 (holding that CBCTs are not branches as to their withdrawal and cash advance functions but are branches as to their deposit function).

savings or checking account is not the payment of a check, whether viewed in the perspective of technical legal rules or common understanding. Under the Uniform Commercial Code, its antecedent, the Negotiable Instruments Law, and customary commercial usage, the distinguishing feature of a check is its transferability by a payee or holder to a third party.* In no respect does an EFT withdrawal direction, a magnetic "key" card or any other feature of an EFT withdrawal embody any property of transferability by a payee or holder.

Moreover, EFT withdrawals can be made not only from checking accounts but from bank savings accounts and, under regulations of the Federal Home Loan Bank Board, from S&L savings accounts. The Federal Reserve Board's Regulation Q prohibits checking privileges against bank savings accounts, and the Home Owners' Loan Act of 1933 provides that S&L savings accounts "shall not be subject to *check* or to withdrawal or transfer on *negotiable* or *transferable* order or authorization. . . ." 12 C.F.R. § 217.2 (1976); 12 U.S.C. § 1464(b)(1) (emphasis added).

An EFT transfer of funds between two accounts of a single customer at the bank is not receiving a deposit under 36(f). In the case of a customer's use of an electronic terminal to direct a transfer between his checking and savings accounts at the bank, or from his credit card to his checking account there, no funds pass at the terminal between the customer and the bank. The customer could achieve the same result—at greater expense to himself and the bank, but without raising any branching problems—by simply picking up the telephone and transmitting an identical direction to the bank telephonically.

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* U.C.C. § 3-104 and U.C.C. comments 2 and 6 thereto. NIL § 1.

As to EFT cash advance transactions, the use of a CBCT "key" card to obtain a cash advance through an electronic terminal cannot be meaningfully distinguished under 36(f) from the use of an ordinary bank credit card (e.g. Master Charge or BankAmericard) to obtain goods, services or cash from a merchant.* In both cases, the customer obtains a credit accommodation from and incurs indebtedness solely to his bank. The courts below and in *IBAA* attempt to distinguish an EFT cash advance from a bank credit card transaction at the place of business of a merchant on the grounds that the merchant's premises do not constitute an established place maintained by the bank furnishing the credit card services, that interest does not accrue from the date of use of a bank credit card but only if payment is not made within a specified period after billing, and that the goods, services or money delivered to the customer upon use of a bank credit card belong to the merchant, not the bank.

These distinctions do not represent substantive differences. For example: (i) If ownership or control of the terminals were a decisive consideration, POS terminals, which are limited communications devices not unlike telephones, and are operated by a merchant's employees rather than a bank customer, could as readily be owned or maintained by the merchant rather than the bank. Indeed, if the branching status of POS terminals turns on whether they are owned by the bank or the merchant, it can be safely predicted that the latter will swiftly come to own or control any POS terminals located in their stores which are connected to bank computers. (ii) POS terminals owned by banks and located in retail stores are frequently used by merchants in lieu of telephones to

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* The District Court in *State of Colorado* v. *First National Bank of Fort Collins*, 394 F. Supp. 979, 985 (D. Colo. 1975) expressly so held.

expedite communication in obtaining bank authorization of a Master Charge or BankAmericard credit card purchase.* Under the *IBAA* court's reasoning adopted by the court below, a credit card purchase as to which the merchant obtains bank authorization would not be branching if the merchant communicates with the bank via the merchant's own POS terminal or telephone but would be branching if he communicates by POS terminal owned, or telephone service paid for, by the bank.** (iii) The fact that interest does not normally accrue until a specified period after a bank credit card customer is billed in no way alters the fact that the bank extends credit to its customer at the time of a credit card purchase at a retail store, nor is there anything inherent in a bank credit card transaction which would prevent a bank or banks generally from accruing interest from the time of the transaction. (iv) As in a typical bank credit card purchase, in an EFT transaction at a POS terminal the goods or cash delivered to the bank customer belong to the merchant, not the bank.

Thus, there are at the very least, ample reasons for holding that off-premises electronic terminals are not branches under 36(f) with respect to each of the foregoing functions.

In addition, all CBCT transactions—irrespective of the function—involve multiple incidents occurring at different locations: the terminal, the main computer, the bank's

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* See Affidavit of William D. Plechaty, attached as Appendix D to Brief in Support of Continental Bank's Motion for Summary Judgment in the District Court at 11.

** Similarly an unmanned terminal owned by a national credit card company such as American Express, and available to cardholders of many banks and other financial institutions, would presumably not be a branch under the *IBAA* reasoning adopted by the court below, whereas one owned by a bank would be a branch if used by that bank's cardholders.

books and records, on bank premises when arrangements are made for electronic services or bank employees perform verification and other processing functions, and even the switching center and the telephone lines. Deciding whether each kind of CBCT transaction involves branching under 36(f) by attempting to isolate one of the several incidents of the transaction as the key or characterizing incident in order to ascribe a single location to the transaction is necessarily arbitrary and productive of fortuitous results.

Moreover, a POS terminal at the service counter of a grocery store or an unmanned terminal—each with its circumscribed functions and controlled usage—represents a limited off-premises presence for a bank. Finally, EFT —which increasingly promises to displace the traditional paper-dominated payments mechanism—is a radical innovation in funds transfer stemming from advances in technology not even remotely conceived of in 1927 when the McFadden Act was adopted.

In short, reference to the literal words of the statute is not sufficient to determine the extent to which § 36 applies to the new technology. Accordingly, it is necessary to turn to the purpose and policy of the statute to determine how broadly it should be construed.

2. The legislative history of the McFadden Act from which 12 U.S.C. § 36 derives and the decisions of this Court in *Walker Bank* and *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) (*"Plant City"*) identify competitive equality between national and state banks competing within the state in question as the overriding objective of the McFadden Act.

As in the case of electronic funds transfer machines, each of the activities at issue in *Plant City*—an armored car messenger service, which served businesses by picking

up cash and checks for deposit and delivering currency and coin, and a stationary deposit receptacle with a locked compartment for night pouches left for retrieval by the messenger service—was an activity the status of which as a branch bank under 36(f) was certainly questionable. As in the case of electronic terminals, a messenger service or a deposit receptacle is a distinctly limited off-premises presence for a bank.*

This Court's *Plant City* opinion, after noting that Florida's statute prohibited all off-premises activities to Florida state banks,** repeatedly returns to the theme that "the purpose of the statute [the McFadden Act] is to maintain competitive equality."*** If in that case the

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*And whether deposits were received for purposes of 36(f) when the customer physically turned over the items to be deposited or when the debtor-creditor relationship arose pursuant to which the customer became entitled to draw on deposited funds presented a further uncertainty in *Plant City*.

** 396 U.S. at 130-31.

*** "On this point [whether the definition of branch in the state in question controls the content of the Federal definition as suggested by the Court of Appeals for the Fifth Circuit in the decision appealed in *Plant City*] the language of the Court of Appeals perhaps overstated the relation of state law to the problem, since the threshold question is to be determined as a matter of federal law, having in mind the congressional intent that so far as branch banking is concerned 'the two ideas shall compete on equal terms and only where the States [allow] their own institutions [to] have branches.' In short, the definition of 'branch' in § 36(f) must not be given a restrictive meaning which would frustrate the congressional intent [competitive equality between state and national banks within the state in question] this Court found to be plain in *Walker Bank*." 396 U.S. at 134.

* * *

"Because the purpose of the statute is to maintain competitive

(Footnote continued)

messenger service and receptable had not been held branches under 36(f), and national banks in Florida were thus given a competitive edge over Florida state banks, the principle of competitive equality would have been frustrated, as this Court observed.*

In contrast to *Plant City*, a decision that off-premises electronic funds transfer machines of national banks in Illinois are not branches under 36(f) will not place Illinois state banks at a competitive disadvantage. Section 5(11) of the Illinois Banking Act provides that notwithstanding any other provision of that Act, Illinois state banks shall have all powers of national banks.** Section 5(11) must be taken into account in a case where the threshold question is whether the activity is a branch at

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(Footnote continued)

equality, it is relevant in construing 'branch' to consider, not merely the contractual rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage in its competition for customers." 396 U.S. at 136-37.

* * *

"Here we are confronted by a systematic attempt to secure for national banks branching privileges which Florida denies to competing state banks." 396 U.S. at 138.

* *Ibid.*

** Section 5(11) of the Illinois Banking Act states, in relevant part, that an Illinois state bank shall have the power:

"Notwithstanding any other provisions of this Act, to do any act and to own, possess and carry as assets property of such character, including stock, which is at the time authorized or permitted to National Banks by an Act of Congress, but subject always to the same limitations and restrictions as are applicable to National Banks by the pertinent Federal law." Ill.Rev.Stat. ch. 16½, § 105(11) (1975).

all under Federal law.* This threshold question is not determined solely by reference to the state branch banking laws, for as this Court held in *Plant City:*

> "[T]o allow the states to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in [Section 36(f)] of a general definition of branch". 396 U.S. at 133-34.

Plant City strongly suggests that competitive equality between state and national banks within the state in question is the dominant consideration in construing 36(f).** Section 5(11) ensures to Illinois state banks competitive parity with national banks in Illinois. The Florida statute relevant to *Plant City* contained no comparable provision.***

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* In contrast, a statute such as Section 5(11) would obviously not be relevant in a case such as *Walker Bank* where the activity at issue (there a manned full-service brick-and-mortar banking office) is clearly a branch under the Federal definition and the sole inquiry is whether and to what extent state statute law relating to branch banking affirmatively authorizes that kind of branch to state banks.

** Indeed, if the facts in *Plant City* had been precisely as they were except that the Florida Comptroller, by administrative interpretation or enforcement practice, had permitted Florida state banks to maintain messenger services and deposit receptacles of the kind at issue there, there would have been every reason to decide that the messenger service and receptacle were *not* branches under 36(f).

***At least 12 other states have statutes comparable to Section 5 (11) under which a similar issue could arise. See Ala. Code tit. 5, § 105 (1960); Alaska Stat. § 06.05.005(3)(B) (1962); Ariz. Rev. Stat. Ann. § 6-184(2) (1974); Ark. Rev. Stat. § 67-501.1(o) (Cum. Supp. 1975); Colo. Rev. Stat. Ann. § 11-2-103(e) (1974); N.J. Stat. Ann. § 17:9A-25(12) (Cum. Ann. Pocket Part 1975); N.C. Gen. Stat. § 53-43(5) (1975); N.D. Cent. Code § 6-03-02.9 (1975); Okla. Stat. Ann. tit. 6, § 203(5) (1966); S.C. Code Ann. § 8-57.1 (Cum. Supp. 1975); Tenn. Code Ann. § 45-401 (Cum. Supp. 1975); Va. Code Ann. § 6.1-5.1 (Cum. Supp. 1975).

3. The decision below and in *IBAA* misapply this Court's holding in *Plant City*. Although recognizing that *Plant City* requires that the content of 36(f) be determined by Federal law, these courts ignored the fact that the absolute prohibition under Florida state law and administrative practice of all off-premises banking activity by Florida state banks set the context for this Court's interpretation of 36(f) in *Plant City*.* They failed to recognize that in *Plant City* the maintenance of competitive equality between national and state banks in Florida was a principal consideration in giving such content to the 36(f) definition of "branch".

Insistence on an inflexible Federal definition of "branch" to be applied uniformly nationwide led the court below and in *IBAA* to depart from the principle of competitive equality underlying the McFadden Act. *Walker Bank* and *Plant City*. *IBAA* held (and it is implicit in the decision below) that even in states in which CBCTs are not treated as branches of state banks (whether by express state statute, by court decision or by administrative interpretation or practice) CBCTs are branches for national banks. In such a state, this would mean that electronic terminals of state banks are free of minimum capital and branch application requirements, but a national bank must, for each off-premises terminal maintained by it, both meet the minimum branch capital requirements set forth in the National Bank Act and process a branch application with the Comptroller of the Currency. The minimum capital requirement imposed on Continental, solely for the 62 POS terminals which it proposes to install in one supermarket chain, would be $12,400,000 although the total cost of all of these terminals is less than $100,000. Under the inflexible interpreta-

* See 396 U.S. at 130-31.

tion of 36(f) adopted by the court below, it is possible that a national bank could be foreclosed by capital requirements from participating in a substantial network of POS terminals in which state banks located in the same state could participate by express state statute.

4. Since neither the literal language of 36(f) nor the decisions interpreting it nor the principle of competitive equality is dispositive of the status under 36(f) of electronic funds transfer machines in states such as Illinois whose statutes ensure competitive parity to state banks, it is necessary to consider other relevant factors.

There is no suggestion in the legislative history of the McFadden Act of any Congressional intent to inhibit national banks from using technical improvements advantageous to the public. Modern electronic technology, and its applications to computers and to communications techniques, were not within the contemplation of Congress in 1927.

In resolving a statutory uncertainty it is proper for a court to give weight to advantages to the public and to factors bearing upon competition and the soundness of the banking system and national payments mechanism. State branch banking prohibitions are inherently anticompetitive. See *United States* v. *Citizens & Southern National Bank,* 422 U.S. 86, 118 (1975). In giving an expansive cast to the 36(f) definition of branch with respect to EFT services and thus foreclosing national banks from competing in the offering of EFT services in a state whose laws assure parity to state banks, the court below failed to accord proper weight to the national economic policy in favor of competition. Cf. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 326 (1963); *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). It also failed

to consider the significant potential of EFT for affording convenience to the public and containing the burden on the payments mechanism and banks of processing and clearing an ever-growing volume of paper items. Finally, it failed to consider the implications of the administrative policies of the State of Illinois as reflected in administrative interpretations and enforcement practices of the Illinois Commissioner.*

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* The Illinois Commissioner has permitted, among other things, (i) the use of bank credit cards to finance purchases at retail stores for which the retailer frequently obtains bank authorization through use of a bank-owned POS terminal maintained at the retailer's store, (ii) the dispensing by a bank to its customers of cash withdrawals and loans through use by the customer of his "key" card at remotely located unmanned terminals maintained at the banking premises of other banks and (iii) wire transfer arrangements of various kinds including one whereby an S&L offers to customers, in conjunction with an S&L account, a free checking account at a bank and effects deposits to its customer's bank account by transferring funds from the S&L's own account with such bank in the same manner as a customer deposit through a Continental POS terminal at a supermarket is effected by the transfer of funds from the store's bank account at Continental to the customer's bank account there. See letter of Bernard R. Rabens, Chief Examiner, Chicago Office, Illinois Commissioner of Banks and Trust Companies, attached as Appendix VII to November 12, 1975 Memorandum of Continental Bank in the District Court.

It is distinctly possible that one or more of the foregoing activities would be branching for a national bank in Illinois if the *IBAA* court's expanded uniform definition adopted below stands. Moreover, as EFT becomes increasingly widespread, Illinois state banks may well offer further EFT services within the broad category viewed to be branching for a national bank. As in the case of the present activities of Illinois banks described above, it is not unlikely that the Illinois Commissioner would approve or tolerate some or all of these activities. Thus, if the standard adopted by the Court of Appeals below is permitted to stand, national banks in Illinois will be at a competitive disadvantage to Illinois state banks as to any activities now or hereafter permitted to state banks which fall within such a definition.

Whether or not banks are permitted to offer EFT in Illinois, S&Ls, credit unions, national credit card companies and others will.* The McFadden Act was designed to preserve a sound banking industry within the dual banking structure, not prevent banks from competing effectively against their nonbank competitors. As recently as 1963 this Court recognized that the nation's funds transfer mechanism—then almost totally dependent on the checking system—was the exclusive domain of commercial banks.** The decision of the court below would foreclose commercial banks in Illinois, which have been among the leaders in developing the new EFT system, from competing with nonbanking entities in offering EFT services.

It is important to all banking customers—not only to the banks—that significant technical advances such as EFT not be chilled even before their usefulness can be tested. Under the decision of the Court below, national banks would be unnecessarily prohibited from offering EFT services in some states and unnecessarily handicapped as against state banks offering EFT services in others.

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* 12 C.F.R. § 545.4-2 (1976) (Federal S&Ls); 12 C.F.R. § 721.3 (1976) (Federal credit unions).

** "Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits. This distinctive power gives commercial banking a key role in the national economy. . . . Furthermore, the power to accept demand deposits makes banks the intermediaries in most financial transactions (since transfers of substantial moneys are almost always by check rather than by cash) and, concomitantly, the repositories of very substantial individual and corporate funds." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 326 (1963).

CONCLUSION

Because the Court below has erroneously decided important Federal questions, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 30, 1976

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 76-1083, 76-1084

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff-Appellee, Cross-Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Defendant-Appellant, Cross-Appellee.

Nos. 76-1085, 76-1086

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff-Appellee, Cross-Appellant,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 75 C 2027, 75 C 3144
HUBERT L. WILL, *Judge.*

Argued May 24, 1976 — Decided May 27, 1976

Before CLARK, *Associate Justice,** SWYGERT and BAUER, *Circuit Judges.*

* Honorable Tom C. Clark, Associate Justice (Retired), Supreme Court of the United States, sitting by designation.

Per Curiam. These two cases—consolidated for argument—are among a series of six cases filed in the federal courts in the last year involving the question of whether off-premises electronic bank facilities known as Customer Banking Communication Terminals (CBCT) are branch banks within the meaning of the National Bank Act, 12 U.S.C. § 36(f).[1] See *Independent Bankers Association of America* v. *Smith,* 402 F.Supp. 207 (D.D.C. 1975), affirmed March 23, 1976, ... F.2d ..... (C.A.D.C. 1976); *State of Missouri ex rel. Kostman* v. *First National Bank in St. Louis,* ..... F. Supp. ....., now on appeal in the Eighth Circuit; *State of Colorado ex rel. Bloom* v. *First National Bank of Fort Collins,* 394 F. Supp. 979 (D. Colo. 1975), on appeal in the Tenth Circuit; and *State of Oklahoma ex rel. State Banking Board* v. *Utica National Bank and Trust Company,* ..... F. Supp. ..... (N.D. Okla. 1975). In the latter two it was held that CBCT was not branch banking, while in the remaining four the opposite conclusion was reached. In the consolidated cases before us the district court held that the CBCT facility was a branch bank under § 36(f) except with regard to the withdrawing of cash by card and payments made on installment loans due the bank. These latter functions were held not to be branch banking and were, therefore, permissible; but where either deposits were made, checks were cashed or money was lent the CBCT operated as a branch and was impermissible under § 36(f), and the banks were perma-

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[1] *McFadden Act,* 12 U.S.C. § 36(f):

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

nently enjoined from using the system. A stay was granted pending appeal. We affirm the judgment of the district court save and except the holding that the withdrawing of cash and the payments on installment loans do not constitute branch banking, which we reverse.

Subsequently to the judgment in this case the opinion of the Court of Appeals for the District of Columbia in *IBAA* v. *Smith, supra,* came down which held that all of the functions performed by CBCT constituted branch banking, including both the withdrawing of cash and the payments made on installment loans due the bank. We have studied all of the opinions in these cases and have concluded that the opinion in *IBAA* v. *Smith, supra,* decides the issues involved correctly.

We see no need for an elaborate opinion in this case. Judge Will has ably covered the off-premises functions performed by CBCT as to deposits, cashing of checks and the loaning of money; Judge Wilkie in the *IBAA* v. *Smith* case has thoroughly canvassed the functions of the withdrawing of cash and the payment of installments on loans; in the latter respects we adopt the reasoning of his opinion but add the following comment as to the latter two functions.

The district court here based its conclusion on the functions of CBCT as to the withdrawing of cash and the payment of installments on loans upon the provisions of the Uniform Commercial Code (U.C.C.) and Ill. Rev. Stat. 26 § 3-104(2) which declares a check to be a negotiable instrument drawn on a bank and payable on demand; a writing signed by the maker or drawer and containing an unconditional promise or order to pay a sum certain in money; with negotiability being the essential characteristic of a check. From this the district court concluded that a card inserted into the CBCT machine to secure

money was not the cashing of a check within the meaning of U.C.C. or in the common understanding of check cashing. We cannot agree. As was said in *IBAA* v. *Smith, supra,* this "is exhalting form over substance—exactly what the Supreme Court instructed us not to do" in *First National Bank* v. *Dickinson (Plant City),* 396 U.S. at 137 (1969). The check is merely the means used by the bank to attain the desired objective, *i.e.,* the payment of the money to its customer. The card serves the same purpose as the check. It is an order on the bank. Any order to pay which is properly executed by a customer, whether it be check, card or electronic device, must be recognized as a routine banking function when used as here. The relationship between the bank and its customer is the same. Indeed, the trial court here recognized this when it characterized a CBCT withdrawal as the "functional equivalent" of a written check. And appellant Continental Bank gives the card transaction the same significance:

> "The EFTS (Electronic Funds Transfer Systems) at issue in the present case are, *extensions* of the principle of immediate access to customer accounts *in a manner dispensing with underlying paper such as checks.*" Emphasis added. See brief of the Bank supporting its motion for summary judgment, page 8 (No. 2027).

Moreover, although U.C.C. defines a check as a negotiable instrument, it also provides, Section 3-104(3):

> "As used in other Articles of this Act, and as the context may require, the terms . . . 'check' . . . may refer to instruments which are not negotiable within this Article as well as instruments which are so negotiable."

Just as a transfer of funds by cable or telegraph is in law a check, *Lourie* v. *Chase National Bank,* 42 N.Y.S. 2d 205 (Sup. Ct. N.Y. Co. 1943), despite the non-negotiability of the cable, the card here for the purpose of withdrawing

cash is a check. What must be remembered is that the foundation of the relationship between the bank and its customer is the former's agreement to pay out the customer's money according to the latter's order. See White and Summers, Uniform Commercial Code 1972 at 551. There are many ways in which an order may be given and one way of late is by computer record. *Transport Indemnity Co.* v. *Sieb,* 178 Neb. 253 (1965). And the Ninth Circuit accepts the same concept that computer impulses constitute sufficient writing to meet the order test. *United States* v. *DeGeorgia,* 420 F.2d 889 (1969). Finally a CBCT order is a transaction that springs from a written agreement between the bank and its customer that clearly makes CBCT withdrawals a routine banking function performed at the main office and clearly within the branch definition as declared by Representative McFadden's own analysis of the Section at the time of its adoption:

> "Sec. 7(f) [36(f)] defines the term 'branch.' Any place outside of or away from the main office, where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch if it is legally established under the provisions of this Act." 68 Cong. Rec. 5816 (1927).

It, therefore, is plain to us that the cash withdrawal and payments on installment loans functions of the CBCT system are also business transactions carried on at the main office and are therefore within the branch definition of § 36(f).

AFFIRMED IN PART AND
REVERSED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

75 C 2027

STATE OF ILLINOIS, ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff,

vs

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Defendant.

75 C 3144

STATE OF ILLINOIS, ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff,

vs

THE FIRST NATIONAL BANK OF CHICAGO,

Defendant.

ORDER

These actions came on for decision on cross motions of the plaintiff and the defendants for summary judgment, and for the issuance of permanent injunctions enjoining the operation by the defendants of what are known as Customer Bank Communication Terminals (CBCTs).

The issues having been duly briefed, considered, and an opinion having been filed, IT IS HEREBY ORDERED AND ADJUDGED:

1. That the defendants' motions for summary judgment are denied, and that the plaintiffs' motion for summary judgment is granted.

IT IS FURTHER ORDERED AND ADJUDGED:

2. That the defendants, Continental National Bank and Trust Company of Chicago, and The First National Bank of Chicago are permanently enjoined from operation of Customer Bank Communication Terminals which permit deposits to be made at such terminals, permit funds to be transferred between the accounts of a customer, or permit the borrowing of funds in any amount through the use of bank credit cards or otherwise, all as determined in the opinion entered herein.

3. The foregoing injunction is stayed pending an appeal to the United States Court of Appeals for the Seventh Circuit on condition:

a. That such appeal be expedited by the parties, and,

b. That no additional CBCTs be put into operation during the period of the stay, which perform any of the functions set forth in paragraph 2 hereof.

E N T E R
Hubert L. Will
JUDGE

Date Dec. 30, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

75 C 2027

STATE OF ILLINOIS, ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff,

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CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Defendant.

75 C 3144

STATE OF ILLINOIS, ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Defendant.

MEMORANDUM OPINION

This opinion disposes of cross motions for summary judgment filed by Continental Illinois National Bank (Continental) and First National Bank (First National) as well as the State's Commissioner of Banks and Trust Companies in related cases brought by the Commissioner. The state seeks declaratory and injunctive relief with respect to the defendant's use of Customer Bank Communication Terminals (CBCTs). Specifically, the issue is whether or not CBCTs are "branches" under the McFadden Act,

12 U.S.C. §36, and subject to the Act's proscriptions regarding branch banking.

1. THE FACTS

The parties have entered into stipulations of uncontested facts which we adopt and incorporate by reference herein. In substance, they are as follows.

Continental currently operates two unmanned CBCTs located at 2 Illinois Center and in the Chicago North Western Railroad Station. These terminals are on-line machines connected directly to one of Continental's main office computers. Communication between CBCTs and the main office computer is by telephone lines which carry electrical impulses back and forth approximately one per second. The lines are leased from the Illinois Bell Telephone Company.

At both CBCTs, Continental customers and depositors, using their Continental Banking cards, are allowed to:

a) withdraw cash (in the amount of $25.00 or any multiple thereof, up to $100.00) from their savings, checking or credit card accounts;

b) deposit checks or currency in a checking or savings account. At the time of the transaction, the customer is given a receipt at the CBCT indicating the amount and date of the deposit; it is not credited to his account and he may not draw on it until it is received and verified at the main banking premises;

c) transfer funds between accounts: checking to savings, credit card to checking, or savings to checking; and

d) make payments on Continental Bank installment loans or credit card charges.

For all of the foregoing functions, the procedure for operating the terminals is essentially the same. First, the customer inserts his Continental Banking Card into the CBCT, thus activating the Terminal. This card contains an electronic funds transfer system (EFTS) access number. The CBCT scans the card's magnetic tape. If the card is damaged, it will be returned to the customer. If it has expired, it will be "captured", i.e., retained by the machine. If the card is neither returned nor captured, the CBCT will instruct the customer to build a "message" to be sent to Continental's main computer. The customer has 90 seconds to enter the first item in the "message", his Personal Identification Number (PIN), a randomly generated number used to verify that the customer addressing the CBCT is the proper user of the card. If he fails to enter his PIN within 90 seconds, the card will be captured.

After entering his PIN on the amount keyboard (the amount window remains dark during this time), the customer is instructed to select the type and amount of the transaction he desires to effect, first, by pressing a key on the transaction keyboard and then by entering the total dollar and cents amount on the amount keyboard. This amount will be displayed in the amount window.

If the customer requests cash in an amount that cannot be dispensed by the machine, which is supplied only with packets of $25.00, the card will be returned and the customer will be asked to begin again. If the amount is one that the machine can dispense, and the customer sees that it is stated correctly in the amount window, he presses the "enter" key. If the amount or type of transaction shown in the window is incorrect, the customer presses the "clear" key and begins again.

When the "enter" key is depressed, the CBCT sends a message over the telephone wires to the Bank's main computer. This message contains the customer's EFTS access number, his PIN, and the transaction request he has entered. The main computer which receives this information is an IBM 370 containing several files kept on "disc" (a type of storage medium for data). These include customer authorization files, indexed by EFTS access number; a file of PINs, carried in a scrambled pattern to prevent unauthorized access or accidental discovery; a transaction log file to record the day's work; and a maintenance history file.

When the message is received, the main computer checks first to be sure that there is an EFTS master record that matches the access number sent by the CBCT. If there is no such record, the card is assumed to have been issued by another bank and the computer will instruct the CBCT to return it to the customer. If the EFTS Master Record is located, then the PIN in the request is matched to the scrambled number in the PIN master file. If they do not correspond, a message will be sent back to the CBCT asking the customer to try again. If, after two more attempts, the customer still has not entered the correct PIN, the main computer will instruct the CBCT to capture the card which it will do.

If the PIN entered by the customer is correct, the main computer will then check to make sure that the customer has not exceeded the daily withdrawal limit or the maximum limit on overall use of his card. If he has exceeded these limits, the CBCT will be instructed to return the card. If the customer is within the proper limits, the main computer will go on to check the validity of the transaction requested. It will verify first that the necessary ac-

counts actually exist and, if so, are not restricted. If this information is in order, the main computer will check the "capture code" to determine whether the card has been revoked or suspended in which case the CBCT will be instructed to capture the card. If the card is not listed in the "capture code", the main computer will send an authorization reply to the CBCT Terminal.

The CBCT will respond to this reply by continuing with the next step in the transaction. In the case of a deposit or payment transaction, a drawer will open and the customer will be asked to place in the machine an envelope containing his payment or the items to be deposited. Once it is in the machine, the envelope is stamped with a receipt number in the sequence of the day's business. A receipt carrying the location and the number of the CBCT, the expiration date of the card, the type of transaction, the date and time, the Bank's own identification number, the customer's account number, the type of transaction (for a second time), the amount, and the statement that "All transactions are subject to proof and verification" is printed in duplicate at the same time. One copy is dispensed to the customer and one is retained in the machine. When the receipt is dispensed, the CBCT sends back to the main computer a completion status message (CSM). On receipt of the CSM, the main computer will record the transaction on its EFTS master record for the transaction just completed.

After being authorized by the main computer, the other types of transactions proceed in a similar manner. When the customer has requested cash, he will receive the appropriate number of $25.00 packets and a receipt with the information set out above. When the customer has requested a transfer of funds between accounts or has au-

thorized payments out of his accounts, he will receive only the appropriate receipt.

Continental also plans to open CBCTs at 62 Chicago Area Dominick's Stores. These terminals will be used for the same kinds of transactions referred to earlier as well as for payment of goods and services purchased by the customer at Dominick's. The only significant difference in the procedure is that a Dominick's employee will operate the machine for the customer.

Defendant First National is presently operating 5 CBCTs at four locations in the City: Rush-Presbyterian St. Luke's Medical Center, Avon Products, Baxter Laboratories, and the Time-Life Building. These were installed as part of First National's "bank at work" program and for a short period, fro August 25 to September 23, 1975, the bank's personnel were soliciting and opening new accounts among employees at the CBCT locations. As of November 1, 1975, First National's CBCTs were to be operated "on-line" and unmanned. First National's CBCTs perform the same functions and are operated in essentially the same manner as those of Continental.

Both banks opened the CBCTs following an interpretive ruling of the United States Comptroller of the Currency (Ruling of December 12, 1974 as modified May 8, 1975) wherein he held that the terminals were not "offices within the meaning of 12 U.S.C. §36(f) and even if a CBCT is considered to be a branch office, branch agency, or branch place of business, it is not receiving deposits, paying checks, or making loans within the meaning of 12 U.S.C. §36(f)." In their motions, defendants argue that, as a matter of law, the CBCTs are not branches within the meaning of the Act.

II. THE LAW

Title 12 U.S.C. §36(c) allows national banking associations with the approval of the Comptroller of the Currency (Comptroller) to operate new branches when, where and how state law would allow state banks to operate such branches. *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Section 36(f) defines the term branch as follows:

> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The leading case construing 12 U.S.C. §36(f) is *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969). In that case, the Court was called upon to determine whether an armored car messenger service or an off-premises receptacle for the receipt of packages containing cash or checks for deposit constituted a branch within the meaning of the Act. The First National Bank in Plant City, Florida (Plant City First National) had received permission from the Comptroller to operate these two services. The armored car messenger service was advertised by the bank as a mobile drive-in. Checks could be cashed, deposits taken, and, through a "dual control contract," commercial customers could arrange for the car to bring them cash and pick up deposits at their places of business. The armored car was manned by a teller and a driver-guard. Pursuant to contracts between the customers using the service and the bank, deposits were not deemed to be made until the cash or checks were delivered to a teller at the banking house. Conversely, checks were

deemed to be cashed when cash was handed to the messenger and not when delivered to the customer by the armored car.

The stationary off-premises receptacle for receipt of deposits was located in a shopping center one mile from Plant City First National's banking house in a space leased by the bank. The facility consisted of a secured receptacle and night base, together with a writing table supplied with envelopes and transmittal slips. As with the armored car, the messenger who collected the funds from the receptacle was deemed to be an agent of the customer, the funds were not deemed to be deposited until delivered at the bank's premises, and the bank provided insurance for the funds. Since the state of Florida prohibited state banks from having more than one place of business or from transacting business at more than one place, the Court was confronted with whether the activities of Plant City First National authorized by the Comptroller constituted branch banking.

After an extensive analysis of the history and underlying policy of the National Bank Act's branching provisions as well as the federally defined elements of branching, the Supreme Court concluded that the services offered by Plant City First National were branches as defined in Section 36(f) and an attempt to secure for national banks branching privileges which were denied to competing state banks.

As was noted by the Supreme Court in *Walker Bank, supra,* and reiterated in *Plant City,* the passage in 1927 of the McFadden Act, which afforded branching privileges to national banks only to the extent of state authorized state branch banking, was in response to a trend observable during the first quarter of the twentieth century.

During that period the substantial growth in some states of state banks with branches threatened to impair and possibly eventually destroy the national banking system.[1] The McFadden Act was designed to establish "competitive equality" between state and national banks with respect to branching, the question of the desirability of branch banking to be left up to each state. As pointed out in *Walker Bank, supra,* this policy of "competitive equality" survived an attempt during the economic depression to permit national banks to branch irrespective of state law. Accordingly, the Supreme Court in *Plant City* concluded:

> The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation. 396 U.S. at 133.

The Supreme Court in *Plant City* also recognized that, while branching by national banks is permissible only to the extent permitted by state law, what constitutes branching is defined by Federal law. The following language is illustrative of its position:

> We reject the contention made by *amicus curiae* National Association of Supervisors of State Banks to the effect that state law definitions of what consti-

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[1] There was no specific authority in the National Bank Act of 1863 for branching by National Banks. *First National Bank in St. Louis* v. *Missouri,* 263 U.S. 640 (1923). Consequently, at the turn of the century there were very few branch banks in the country. Only five national banks and 82 state banks were operating branches with a total of 119. By the end of 1923, there were 91 national banks and 580 state banks operating a total of 2,054 branches. *First National Bank* v. *Walker Bank,* 385 U.S. 252, 257 (1966).

> tutes "branch banking" must control the content of the federal definition of §36(f). [footnote omitted] Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated. *Walker Bank, supra,* for in §36(c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in §36 of a general definition of "branch." On this point the language of the Court of Appeals perhaps overstated the relation of state law to the problem, since the threshold question is to be determined as a matter of federal law, having in mind the congressional intent that so far as branch banking is concerned "the two ideas shall compete on equal terms and only where the States [allow] their own institutions [to] have branches." In short, the definition of "branch" in §36(f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank, supra.* 396 U.S. at 133-134.

Referring to the §36(f) definition of branching, the Court concluded:

> Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more. It should be emphasized that since §36(f) is phrased in the disjunctive, the offering of any one of the three services mentioned in that definition will provide the basis for finding that "branch" banking is taking

> place. Thus not only the taking of deposits but also the paying of checks or the lending of money could equally well provide the basis for such a finding. 396 U.S. at 135.

The Supreme Court has, therefore, definitively interpreted the McFadden Act with respect to the definition of branching and the underlying policy of the branching provisions.

A. *The Comptroller's Ruling*

On December 11, 1974, the Comptroller issued an interpretive ruling (effective December 24, 1974) which held both as a matter of law and sound policy that CBCTs may be operated by national banks without regard to restrictions in the federal law regarding branching. This holding followed a comprehensive review of the branching statute's background and purposes.

The Comptroller initially held that CBCTs were not branch banks, branch offices, branch agencies, additional offices, or branch places of business. He based this ruling on the impossibility of consummating at a CBCT certain banking transactions associated with a banking office or place of business. These included opening an account with the bank, applying for a loan, purchasing savings bonds, obtaining money orders, cashiers checks or travellers checks, cashing travellers checks, maintaining a safe deposit box, exchanging currency, and engaging in any of a large number of other common retail banking transactions. As additional support for this conclusion, the Comptroller, citing portions of the legislative history, determined that Congress at the time it passed the McFadden Act defined branches in relation to teller windows, which were understood in both functional and physical terms as large and separate facilities. He characterized CBCTs as more closely analogous to mail boxes or tele-

phones through which a customer may communicate with the bank to accomplish certain routine transactions, or to certain routine activities which were approved as non-branching in Supreme Court decisions antedating the McFadden Act.[2]

Alternatively, the comptroller held that, even if a CBCT could be considered a branch office, branch agency, or branch place of business, it does not receive deposits, pay checks or make loans within the meaning of 12 U.S.C. §36(f). Continuing his analysis, the Comptroller held that deposits at unmanned terminals are not made until the cash or checks are received and verified at the bank, cash withdrawals are not made pursuant to the writing of a check but upon the presentation of a card, and cash withdrawals on the basis of a credit card or authorized overdraft are not loans because they are effectuated pursuant to a previously approved line of credit and are subject to verification. At the manned terminals, he concluded, the transfers between customer and store accounts are consummated at the bank and cash withdrawals are from the store rather than the bank. Finally the Comptroller distinguished the contractual arrangements for the operation and use of CBCTs from those governing deposits and withdrawals from the armored car messenger service and deposit receptacles in *Plant City, supra,* by holding that, with respect to the use of CBCTs, they have a significant purpose other than removal of the possibility that monies received will become deposits within the meaning of §36(f).

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[2] In *First National Bank in St. Louis* v. *Missouri,* 263 U.S. 640 (1923), the Supreme Court endorsed a 1911 opinion of Attorney General Wickersham which held that a difference exists between the mere appointment of agents to receive and collect money and to forward it to the bank, and the establishment of branch banks at which a general banking business is carried on.

In analysing the competitive impact of the use by national banks of CBCTs, the Comptroller placed considerable emphasis upon the use of these terminals by Savings and Loan Associations and Credit Unions pursuant to new regulations promulgated by the Federal Home Loan Bank Board, 30 F.R. 23991, and the Credit Union Administration, 39 F.R. 30107. The Comptroller maintained that the McFadden Act protects the health of the national banking industry from impairment resulting from the loss of customers to savings and loans and credit unions.[3]

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[3] On May 19, 1975, the Comptroller modified his ruling following a hearing held on April 2 and 3, 1975, at which testimony was received from 35 witnesses. The hearing was held to reconsider 12 CFR §7.7491, the ruling of December 12, 1974, pursuant to the suggestion of Senator McIntyre, now Chairman of the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, that the Comptroller might have overlooked several policy considerations in announcing his ruling and that it would have been useful to have a hearing. A similar suggestion was made by the Independent Bankers Association of America in connection with a petition filed by the IBAA seeking a recission of the Comptroller's interpretation. Based on written statements submitted in response to his January 16, 1975 notice of proposed rule-making and on facts that came to the Comptroller's attention through hearings held on March 14, 1975 before the Senate Subcommittee, the Comptroller found no reason to alter his legal conclusions. Several modifications were made, however, which reflect the experimental nature of the CBCTs and were designed to facilitate the combined development of the CBCTs under appropriate monitoring. The modifications did not go to the substance of the December 12, 1974 ruling with the possible exception of a limitation requiring that no CBCT could be located more than 50 miles away from the bank's main office. The Comptroller suggested that he perceived no danger of the use of CBCTs to penetrate new markets. He suggested, however, that the limitation would be useful to allay the fears of market penetration expressed on behalf of small banks.

B. *District Court Decisions*

Three United States District Courts have ruled on the validity of the Comptroller's interpretive ruling. *State of Colorado ex rel. Bloom* v. *First National Bank of Fort Collins,* 394 F.Supp. 979 (D.Col. 1975); *Independent Bankers Association of America* v. *Smith,* ..... F.Supp. ....., (D.D.C. Decided July 31, 1975); and *State of Missouri ex rel. Kostman* v. *First National Bank of St. Louis,* 75 113 C(1), (E.D. Mo., decided 11/17/75).

In *Bloom,* the CBCT was located at a shopping center approximately 2.8 miles from the main bank building, was not connected with the computer center at the Bank's main office building but operated electrically as a self-contained unit off-line and was unmanned by any personnel. It could be operated by bank customers who had cards which had been encoded with certain information on a magnetic strip. The information consisted of a six digit personal identification number, the customer's checking account or savings account number, his Master Charge number, the number of withdrawals permitted to him each day and the expiration date. The cards used to activate the CBCT could be either Master Charge or a "First 24 Card." The customer initiated the transaction by inserting his card into a slot on the unit and tapping out his personal identification number. The machine would make the identification from the previously encoded information and signal the customer to select one of the available transactions. If the identification was not made, the card was retained in the machine and no transaction was accomplished. As with the terminals in the instant case, those in *Bloom* allowed withdrawals from checking or savings accounts, advances on Master Charge cards, deposits in the form of checks or currency, and transfers from savings to check-

ing and vice versa. At the beginning of each day two persons opened the unit, replenished the cash supply, and transported to the main office the deposits and transaction forms used to identify the type and time of transaction. There the deposits and forms were verified, processed and forwarded to the computer center where the appropriate account was charged.[4] Colorado law prohibited branch banking with the exception of permitting one detached facility within a limited radius of the bank's premises.

Considering the Supreme Court's decisions in *Walter Bank* and *Plant City, supra,* the Court concluded that, similar to the receptacle in *Plant City,* the machine was a place at which deposits were received. Accordingly, the Court held that the machine was prohibited branch banking to the extent of this single function. The Court further held that 1) the transfer of funds between accounts was not a deposit; 2) because the machine would not cash a check, i.e., a written draft, the machine was not a place where checks were paid. The Court explained that, even though the result is the same, the method of communication is different, i.e., instead of a written order there is the depressing of a button. The latter process, the Court continued, is comparable to wire transfer of funds by commercial customers. Finally, the Court held that the machine is not a place where money is lent because, whether the customer obtains prepackaged currency against "Master Charge" or "Balance Plus" (an overdraft of a checking or savings account), he is drawing against a prearranged line of credit. The Court stated that there is no

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[4] Colorado banks were accustomed to receiving deposits in the mail and extending lines of credit to commercial customers who signed master notes and banks regularly made transfers between accounts in different banks.

functional difference between using credit cards to obtain cash and using them to obtain services or products.

Since there was no showing of express authorization for state banks to use the machine to receive deposits, the Court refused as irrelevant additional evidence on the question of banking practices in Colorado. It held simply that, so long as the machine accepted deposits, it was a prohibited branch.

In *Smith, supra,* the Court held that the Comptroller's holding that CBCTs were neither branch offices, banks, agencies, or additional offices or branch places of business within the meaning of the Act and that they did not cash checks, take deposits, or make loans, violated the clear wording of the statute, its legislative history, significant case law and the facts. Quoting from the Supreme Court's decision in *Plant City* and the following language from Representative McFadden relating to Section 26, the Court held that the Comptroller's determination was without merit.

> Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch. 68 Cong. Rec. 5816 (1927).

The Court held the Comptroller's ruling null and void in that it violated the National Bank Act.

In *Kostman, supra,* the Court held, without discussion, that machines performing the same functions as the CBCTs here in question constituted branch banking within the meaning of 12 U.S.C. §36(f).

III. ANALYSIS

The state of Illinois prohibits branching by state banks. Illinois Revised Statutes, Chapter 16½, §106 provides:

> No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in this or any other state of the United States any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business.

Upon examination of the functions of CBCTs, we conclude that certain of their operations constitute branching within the meaning of 12 U.S.C. §36(f) and are, therefore, proscribed by §36(c).

Relying upon the Comptroller's analysis, the banks argue that the functions performed at the CBCTs do not fall within the parameters of the federal definition, because, in actuality, deposits are made, checks paid, and money lent at the bank's main premises.

A. *Deposits*

Defendants argue that because the customer is only given a receipt upon depositing checks or currency at the CBCT and because the customer's account is not credited and he is not able to draw on it until it is received and verified against records kept at the main banking premises, deposits actually take place at the bank's premises.

The Supreme Court in *Plant City* dealt with the question of whether a deposit should be determined to have been made upon the creation of the debtor-creditor relationship (receipt and verification) or upon the receipt of the

deposit at a place away from the main banking office. Referring to the legislative purpose of competitive equality between state and national banks, the Court concluded that an advantage was certain to accrue to a bank which maintained a remote place where deposits could be physically received. Accordingly, both the armored car and the deposit receptacle were held to be places for the receipt of deposits within the meaning of §36(f), notwithstanding the contractual terms which provided that no deposit would be credited to the customer's account until physically delivered to the bank.

The Court's analysis in *Plant City* compels a similar conclusion with respect to CBCTs. Even though the customer's EFTS master record is updated immediately to reflect a deposit made at the CBCT, a factor not present in *Plant City,* the crediting of a deposit made at a CBCT is subject to receipt and verification at the main office. The physical receipt of deposits by the machines, notwithstanding contractual arrangements, constitutes "receipt of deposits" under §36(f) as interpreted in *Plant City.* The additional factor of immediate transmission of deposit-related information made possible by the on-line communication between the terminal and the banks' main computer only buttresses the conclusion that the deposit occurs at the time of receipt at the terminal rather than at the bank.

Defendants attempt to attribute significance to the distinction between off-line CBCTs, such as the one found in *Bloom, supra,* and on-line CBCTs such as those in the instant case. The reality of virtually immediate recording of an on-line CBCT initiated deposit transaction by the bank's main computer obviously makes the CBCT a more sophisticated and useful place for receiving deposits than were the receptacle and the armored messenger car in

Plant City or the off-line CBCT in *Bloom*. This does not, however, alter the location of the place where the deposit is made by the customer.[5] The logical extension of defendants' argument would require a finding that deposits received at an off-premises building occupied by bank personnel who took them and wired the information regarding them to the main office's computer, were made at the main office if, pursuant to contract, funds were not finally credited to the customer's account until the main office received and verified the deposit. In consequence, a manned physically remote branch would not constitute a branch under Section 36(f). Under *Plant City* and, in fact, deposits entered at CBCTs are made at the terminal rather than at the bank and the CBCT is, accordingly a branch.

Relying on a statement in the District Court's decision in *Bloom, supra,* defendants argue that the transfer of funds between two accounts of the same customer does not constitute a deposit. They contend that authorizing the bank to make such transfers entails no physical exchange of funds and is pure communication which can be accom-

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[5] In this connection, defendants rely on *Bloomfield Federal Loan Ass'n* v. *American Community Stores Corp.*, 396 F.Supp. 384, 387088 (D. Neb. 1975). The Remote Service Units (RSUs) in *Bloomfield* were capable of transferring funds, withdrawing from savings accounts, depositing in savings accounts, receiving payments related to loans, and other related financial services. The Court held that the regulation governing branches by federal savings and loan associations, 12 CFR §545.14, were not applicable to RSUs due to their *sui generis* characteristics as a means of communication. Noting the non-applicability of the National Bank Act's provisions to federal savings & loan associations and the different standard employed by the Federal Home Loan Bank Board in refusing to authorize branching, the Court held that RSUs were not branch savings and loans. Because of the existence of different standards, this holding is not persuasive authority for a similar holding in the instant case.

plished in the same manner by telephone or mail.[6] We disagree.

After the customer's requested transfer of funds between accounts has been authorized by the bank's main computer he receives a receipt which verifies the transfer. The customer is thus able to accomplish a deposit of funds into his savings or checking accounts at a place remote from the bank's main premises. Furthermore, a qualitative difference exists between the mere telephoning or mailing of the requested transfer. Since the CBCT is clearly a "place" within the Supreme Court's language in *Plant City,* the transfers must be deemed to be consummated by the customer at a place provided by the bank other than the bank's main premises. What happens simply is that the customer withdraws funds from one account, an act not covered by §36(f), and deposits them in another account, a transaction constituting branch banking under that section.

Even considering the somewhat complicated clearance process which precedes the main bank computer's authorization of the transfer, the deposit obviously initiates at the CBCT, and the receipt supplied by the CBCT indicates that the transfer has been consummated. Immediately thereafter, the customer's EFTS master record is updated and the transfer is complete. In the case of mailing or telephoning, no place owned by the bank is involved. The customer simply mails or telephones the requested transfer from an indeterminate location. The defendants' at-

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[6] The defendants also point to Ill. Rev. Stat., Ch. 16½ §102, which excludes from the definition of branch "any place where only records . . . are made, posted, or kept." The functions of a CBCT are generically dissimilar to those of places used for information storage. Records are neither made, posted, nor kept at CBCTs.

tempts to use bank-by-mail and bank-by-telephone analogies breaks down under §36(f)'s two-pronged standard. The off-premise CBCT is a *place* owned by the bank where deposits are received in the form of a customer's withdrawal of money from his checking, savings, or credit card account into his checking or savings account. These conclusions apply equally to deposits effectuated at the POS terminals.[7]

Payments on installment loans or credit card accounts, however, do not constitute deposits inasmuch as they are payments on existing loan obligations or credit card account balances and not the deposit of funds in an account which is subject to future withdrawals by the customer.

B. *Cashing Checks*

The plaintiff urges that, using the practical substantive approach which *Plant City* requires, the withdrawals permitted at CBCTs must be considered the cashing of checks. He contends that a check is whatever is recognized by the bank as an order. We do not agree.

The Uniform Commercial Code, which has been adopted in Illinois, provides at 3-104(2), Ill. Rev. Stat. Ch. 26 §3-104(2), that a check is a negotiable instrument which is drawn on a bank and payable on demand. Section 3-104 defines a negotiable instrument as a writing which is signed by the maker or drawer, contains an unconditional promise or order to pay a sum certain in money and no other prom-

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[7] No substantive difference lies in the distinction between deposits that are made directly into an account because of money or checks placed into the CBCT, and those credited immediately to the customer's account by virtue of transfer from a retailer's account to a customer's account following the customer's presentation of a check to the retailer.

ise, order, obligation or power given by the maker or drawer except as authorized by Article 3, is payable on demand or at a definite time and is payable to order or to bearer. Negotiability, the transferability of the instrument (check) from the payee or holder to a third party, is the essential characteristic of a check.

The insertion of a card into a CBCT to secure $25 packets of cash up to $100 is not cashing a check within the meaning of the UCC or in the common understanding of what constitutes check cashing. No written instrument exists and no third party designation enters into the transaction. A withdrawal at a CBCT is the functional equivalent of cashing a check only with respect to a bearer instrument presented for payment by the maker. Even this analogy breaks down when the withdrawal is made from the customer's savings account upon which no checks could be written or when the cash is obtained through use of a credit card. The limited similarity between a CBCT cash withdrawal and the maker's cashing of a bearer instrument is not sufficient to transform the obtaining of cash by withdrawal from a checking or savings account or through use of a Master Charge card into cashing checks within the meaning of §36(f). The foregoing analysis is equally applicable to withdrawals consummated at POS terminals.

C. *Lending Money*

Relying on *Bloom,* defendants argue that: 1) a cash advance of a credit card is not a loan within the meaning of §36(f) because there is no functional difference between the use of a credit card to obtain goods and services and its use to obtain cash; 2) since no discretion is exercised by the bank when cash is dispensed at CBCTs and since the extension of credit involves a discretionary decision by the lender, the receipt of cash from a credit card ac-

count does not constitute a loan; 3) the loan is made when the customer's line of credit on the account is approved and not at the time of withdrawal which, in any event, is subject to verification at the bank; and 4) that at Dominick's the insertion of the store's employee as an intermediary removes any possibility of it being a loan by the bank.

The initial difference in the function of a credit card to obtain cash at a CBCT and its use to obtain goods and services from a merchant is that the latter engenders the running of interest from the end of a predetermined period for payment, usually 25 or 30 days after receipt of a statement, while the former causes interest to run from the time of withdrawal. Although a loan may be generally defined as a contract whereby one delivers money to another who agrees to return an equivalent sum at a future time, a significant aspect of a loan is the running of interest, the charging of which is a uniform custom in the banking industry. See 7 Zollmann, *Banks and Banking*, §§4823, 4825.

The contracts underlying the issuance of credit cards with respect to cash advances are, in effect, agreements to make small loans to the customer at some future presentation of a valid card. That agreement does not transfer any funds and, therefore, is not a loan as urged by defendants. Nor is interest charged with the opening or establishing of a line of credit. The funds are transferred and interest commences when the CBCT disburses the requested number of $25 packets up to $100.00. That is when and where the loan is made. Many holders of bank credit cards never use them to obtain funds and, therefore, never make any loans with them although the line of credit is available.

It should be noted that, while only a maximum of $100.00 may be borrowed on any given day, the total amount which may be borrowed over a series of days is the maximum line of credit previously established.

It is not accurate, therefore, to contend that the establishment of the line of credit constitutes the making of the loan since, if funds are borrowed on more than one day against the available maximum, the additional funds will not be delivered and interest will not start to run on them until the later date or dates.

The simple use of a credit card to obtain goods or services from a merchant is distinguishable from its use at a CBCT to obtain cash on two grounds. First, the bank has not established a *place* for the dispensing of the goods or services pursuant to the use of the credit card. Second, the use of the credit card to obtain goods or services from a merchant does not commence the running of interest. If payment is made within the specified payment period, no interest accrues at all.

In addition to securing goods or services through use of the bank charge card, a holder may also obtain cash at a retail store CBCT installation. Thus, loans are also made at POS terminals. The participation of the store's employee does not cause a significant difference in the operation of these manned terminals and the unmanned CBCTs. Instead of the customer operating the machine, he presents his card to the store's employee who completes the operation. Although the actual funds received upon withdrawal from the customer's credit card account come from the store's cash on hand, the appropriate debit and credit entries are made to the customer's and store's accounts, and interest immediately starts to run on the customer's

loan. Accordingly, POS terminals, as well as CBCTs, are places where money is lent to the bank's customers within the meaning of §36(f).

IV. DEFENDANTS' ADDITIONAL CONTENTIONS

Additional arguments put forth by defendants include: 1) the competitive equality between National and State Banks will not be disrupted by CBCTs; 2) the Illinois Commissioner of Banks is permitting practices analogous to CBCT banking to exist in Illinois; and 3) the McFadden Act should not be interpreted in such a way as to preclude the introduction into the banking system of new computer technology designed to provide banking customers with greater convenience in banking.

A. *Competitive Equality*

Defendants argue that, because EFTS technology would be available to state banks through franchising agreements with the large national banks and because small banks will need to use these systems if they are to avoid losing their share of the market to competing non-bank financial and non-financial institutions, the local monopolies of small state banks, which Illinois anti-branching laws seek to protect, will be enhanced and not weakened or destroyed by the introduction of CBCTs and their use by state banks under franchise from the large national banks. In addition, they contend that, since the state of Illinois, unlike the state of Florida in *Plant City*, already permits substantial off-premises activities, bank-by-mail, bank-by-telephone, and chain banking, the operation of CBCTs, which are merely a more technologically advanced form of these banking activities, will not result in any competitive advantage to national banks and, therefore, under *Plant*

City and the underlying purposes of the McFadden Act, the Act's definition of branch should not be applied to CBCTs.

The first part of defendants' argument is answered by reference to the purpose of the McFadden Act. As pointed out by the Supreme Court in *Walker Bank, supra,* the legislative history indicates that Congress intended "to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." Since the Congress did not intend to give national banks a competitive advantage, it left the decision of whether to allow branching to the states, permitting national banks to branch to the extent allowed by the state. The legislative history of the McFadden Act does not express a concern for the competitive position of state banks *vis a vis* other state financial and non-financial institutions. Such a concern may not be used to permit national banks to engage in branching activities where states do not permit it.

The second part of defendants' argument is answered by reference to the clear language of the statute:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . at any point within the state in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

No Illinois statute specifically grants Illinois banks authority to have electronic branches. Accordingly, if, as

we are compelled to conclude, CBCTs are branches, the foregoing language forecloses national banks from employing them in Illinois.

In addition, although inquiry into the impact of CBCTs on the competitive position of state and national banks is relevant in construing "branch", it is not a separate test for the existence of a branch. Rather, it is, at most, an adjunctive inquiry, buttressing or diminishing the finding that a bank's deposit, check cashing or lending activities constitute branching. The Supreme Court in *Plant City* did not make a factual analysis of banking activities permitted in Florida that could be considered competitive with the messenger and receptacle services in question. It simply held (p. 136):

> Because the purpose of the statute is to maintain competitive equality, it is relevant in construing "branch" to consider, not merely the contractual rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage in its competition for customers. Unquestionably, a competitive advantage accrues to a bank that provides the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the relationship of debtor and creditor is established at the moment of receipt or somewhat later.

A similar competitive equality analysis here compels the same conclusion. National banks using CBCTs will have a competitive advantage over state banks not currently permitted to use them. It, therefore, reinforces our finding that CBCTs are branches performing banking activities within the meaning of §36(f).

B. *Analogous Illinois Practices*

Defendants contend that the Commissioner's approval of the Check-Mate system, which has been instituted by state savings and loan associations in cooperation with state banks validates the CBCTs under Illinois law. Also, defendants complain that the Commissioner has taken no action with respect to the Heritage Moneymatic 365.

The Check-Mate system allows savings and loans depositors to obtain a free-checking account in a designated Illinois state bank. The initial deposit to the state bank checking account is made through the S&L to the bank. Subsequent deposits may be made either through the S&L or directly to the bank. The Commissioner argues that the S&L is an agent of the customer. Defendants, however, contend that it is an agent of the bank. The Commissioner held that these activities do not constitute branching under state law.

The question of agency is interesting but irrelevant. The Check-Mate system is clearly distinguishable from CBCTs. The latter consists of facilities owned by the bank to accomplish two of the three activities set out in §36(f). It cannot be seriously argued that the S&L is a branch of the bank or vice versa. We assume that, if national banks desire to establish similar arrangements with S&Ls, they may do so. It does not follow, however, that they may therefore set up CBCT branches.

The foregoing analysis applies equally to the Moneymatic 365 system whereby a customer of any one of the several Heritage Group banks may withdraw money from his checking account by the insertion of his Moneymatic 365 card into a machine located on the premises of any of the other listed banks. Not only, as we have held, do such withdrawals not constitute check-cashing, but, as the

presence in the group of the First National Bank of Lockport indicates, national banks are not precluded from engaging in these activities.

C. *New Technology and Development*

Finally, the defendants urge that we should interpret the McFadden Act in such a way that banking customers may enjoy the conveniences available through new electronic computer technology. They also suggest that the recent branching of federally chartered savings and loans in Illinois and the expansion of their services make it appropriate to permit national banks to provide the additional services to their customers available through CBCTs so as to enable the banks to compete with the savings and loans. The Comptroller in his opinion holding CBCTs not to be branches stressed the competition of branching savings and loans as one of the reasons why national banks needed to utilize CBCTs to maintain their competitive position.

We are sympathetic to the substantive considerations underlying both arguments. The public should be permitted, unless other and superior considerations preclude it, to enjoy the benefits of modern technology. Moreover, we are well aware, having written the opinion in *Lyons Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 377 F.Supp. 11 (N.D.Ill. 1974), which held that the Federal Home Loan Bank Board had the power, under its enabling legislation, to grant branch charters to federal savings and loan associations in Illinois, that savings and loan branches are burgeoning in this state, and that banks may very well be suffering competitively.

Unfortunately, the language of the McFadden Act establishes a relatively simplistic test as to what constitutes a branch bank. It was enacted in 1927 at a time when

banks performed far fewer functions and services than they do today. The three services, the performance of any one of which constitutes a branch, represent a fraction of the myriad of activities carried on daily by even the smallest national bank.

There were, of course, no electronic computers in 1927 and no savings and loans. The Home Owners Loan Act was not passed until 1933.

The problem which the McFadden Act sought to solve was the increase in branching of state banks in those states which permitted them to have branches while national banks were not allowed branches regardless of what state law permitted state banks to do. Accordingly, Congress adopted a simple formula. If a particular state authorizes branches for state banks, the Comptroller may permit national banks in that state to have branches. What constitutes a branch, however, was defined by the Congress.

The 1927 McFadden Act is, we believe, obsolete and should be reexamined in the light of current competitive conditions and modern technology. Its language is, however, clear and unambiguous. If a facility owned by a bank is a place "at which deposits are received, or checks paid, or money lent," it is a branch under the Act. However desirable CBCTs may be in providing better service to bank customers and enabling banks to compete with branching savings and loans, it is clear, as previously indicated, that they receive deposits and lend money. They are, therefore, branches. Whether or not they should be is a question properly within the province of the Congress and not the Courts.

Conclusion

In the light of the foregoing, we hold that the functions performed by CBCTs, both unmanned and manned, constitute making a deposit or lending money within the meaning of 12 U.S.C. §36(f) with the exception of cash withdrawals from checking or savings accounts and payments on installment loans and credit card accounts. Additionally, we hold that cash withdrawals as presently effectuated at CBCTs do not constitute cashing checks. Since under *Plant City, supra,* the bank's maintenance of a *place,* off-premises, where either deposits are made, checks are cashed, or money is lent, amounts to branch banking, CBCTs must be so characterized. Accordingly, defendants' motion for summary judgment is denied. Plaintiff, on the other hand, is entitled to summary judgment and a permanent injunction against defendants' use of CBCTs either manned or unmanned.

Hubert L. Will
United States District Judge

Dated: December 29, 1975

APPENDIX C

STATUTES INVOLVED

Federal Statutes:

The definition of "branch" in the McFadden Act, as amended, 12 U.S.C. § 36(f):

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The limitations on "branches" of national banks in the McFadden Act, as amended, included in 12 U.S.C. § 36(c):

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

Illinois Statutes:

Section 6 of the Illinois Banking Act, Ill. Rev. Stat. ch. 16½, § 106 (1975):

> No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at

any other place than such banking house, and no bank shall establish or maintain in this or any other state of the United States any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business.

Section 2 of the Illinois Banking Act, Ill. Rev. Stat. ch. 16½, § 102 (1975):

In this Act, unless the context otherwise requires,

• • •

A "banking house", "branch bank", "branch office", or "additional office or agency" within the meaning of the prohibitions of Section 6 hereof shall include any branch bank, branch office or additional house, office, agency or place or business at which deposits are received or checks paid, or any of a bank's other business is conducted, but shall not include any place at which only records thereof are made, posted, or kept. A place at which deposits are received or checks paid or any of a bank's other business is conducted shall not be deemed to be a branch bank, branch office or additional house, office or agency if such place is adjacent to and connected with the main banking premises, or if it is separated from such main banking premises by not more than an alley; provided always that (i) if such place is separated by an alley from the main banking premises there is a connection between the two by public or private way or by subterranean or overhead passage, and (ii) if such place is in a building not wholly occupied by the bank, such place shall not be within any office or room in which any other business or service of any kind or nature other than the business of such bank is conducted or carried on. A place at which deposits are received or checks paid or any of a bank's other business is conducted shall not be deemed to be a branch bank, branch office or additional house, office or agency if

such a place is a facility established and maintained in accordance with subsection 15 of Section 5 of this act.

Section 5(11) of the Illinois Banking Act, Ill. Rev. Stat. ch. 16½, § 105(11) (1975):

A bank organized under this Act or subject thereto shall be a body corporate and politic and shall, without specific mention thereof in the charter, have all the powers conferred by this Act and the following additional general corporate powers:

• • •

(11) Notwithstanding any other provisions of this Act, to do any act and to own, possess and carry as assets property of such character, including stock, which is at the time authorized or permitted to National Banks by an Act of Congress, but subject always to the same limitations and restrictions as are applicable to National Banks by the pertinent Federal law.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1900

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Petitioner,

vs.

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

1. CONTRARY TO THE ARGUMENTS OF CONTINENTAL, THIS CASE DOES NOT PRESENT NOVEL OR EVEN DIFFICULT QUESTIONS OF FEDERAL LAW WHICH WARRANT CONSIDERATION OF THIS COURT.

This case merely involves the routine application of the simple definition of a "branch" found in 12 U.S.C. §36(f)

to the stipulated functions Continental's CBCTs perform. Section 36(f) provides:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid or money lent."

Clearly, machines at which bank customers can engage in the routine banking functions of depositing or withdrawing money, receiving money on credit, transferring money between accounts and paying indebtedness* are within the parameters of that definition.

Furthermore, the application of section 36(f) to these functions is accentuated by examining the comments of Representative McFadden who describes its scope as follows:

> "Sec. 7(f) [36(f)] defines the term 'branch.' Any place outside or away from the main office, where the bank carries on its business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office,* is a branch if it is legally established under the provisions of this Act." 68 Cong. Rec. 5816 (1927) (emphasis added)

Moreover, in the leading case involving 12 U.S.C. §36(f), *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122 (1969), this Court liberally construed that section at page 135:

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* For a detailed description of the CBCTs, see the opinion of the District Court, 409 F.Supp. 1167 (N.D. Ill. 1975) (attached as Appendix B to Continental's Petition) and the Stipulation of Facts it relies on (attached as an Exhibit to the State's Motion for Summary Judgment in the District Court).

> "Although the definition [in §36(f)] may not be a model of precision, in part due to its circular aspect, it defines the content of the term 'branch'; by use of the word 'include' the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term 'branch bank' at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more." (Emphasis in text)

Thus, in ruling that Continental's CBCTs were "branches" under 12 U.S.C. §36(f), the court below resolved an uncomplicated issue by simply applying a definitional statute. And, in a like fashion, so did the only other appellate court to consider the issue, *Independent Bankers Ass'n of America* v. *Smith,* 534 F.2d 921 (D.C. Cir. 1976) ("*IBAA*").* Neither court encountered any difficulty in reaching the conclusion that these CBCTs are branches.

2. THE ARGUMENTS OF CONTINENTAL ARE MORE APPROPRIATELY MADE TO CONGRESS.

Continental raises various policy arguments and considerations which they say require the examination and reversal of the Seventh Circuit's opinion by this Court. However, regardless of whether the definition of a branch in section 36(f) is to be applied on a national level or on a state-by-state basis,** the decision as to whether Congress

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* See also the District Court opinions listed in footnotes at pages 8-9 of Continental's Petition.

** Even assuming *arguendo* that Continental prevails on this claim and a state-by-state definition of "branch" under 12 U.S.C. §36(f) is used, the clear and explicit prohibition of branching found in Illinois law (Ill. Rev. Stat. 1975, Ch. 16½, §106) and the strict reliance on state law found in 12 U.S.C. §36(c) would still preclude them from prevailing in this matter.

should require capitalization of each CBCT, and should protect national banks from non-bank competition and should insure their "proper" place in our economy must be made by Congress and not this Court. In the absence of language amending the clear provisions upon which the decisions below and in *IBAA* were based, those decisions should stand.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION

BRIEF AMICUS CURIAE IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1900

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Petitioner,

vs.

STATE OF ILLINOIS ex rel RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION

Independent Community Banks in Illinois (hereinafter "ICBI"), respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused. In support of its motion, ICBI respectfully suggests to this Honorable Court the following:

1. ICBI, an Illinois not-for-profit corporation, is an organization of 265 small and medium sized community

banks located throughout the State of Illinois, including the City of Chicago. As such, ICBI represents a constituency most likely to be directly affected by the economic and business impact of any decision in this cause.

2. ICBI's interest in this case arises from several factors. Recently, ICBI was plaintiff in an action in the United States District Court for the Northern District of Illinois against one of the defendants-appellants (i.e., First National Bank of Chicago) in the instant cause. In its action, ICBI sought an injunction prohibiting the First National Bank of Chicago from operating "community offices" in connection with electronic banking facilities known as Customer Bank Communication Terminals ("CBCT's") in ten Chicago and suburban locations. This action was settled by agreement whereby the First National Bank of Chicago agreed to close its community offices and to leave the CBCT's in place pending and subject to the decision of the Court of Appeals for the Seventh Circuit which the petitioner, Continental Illinois National Bank & Trust Company of Illinois, now seeks to bring before this Court by way of a writ of certiorari. Accordingly, ICBI has a direct and vital interest in any action taken by this Court.

3. In the instant case, the petitioner has raised questions far broader than the issue of branch banking as it applies to electronic banking facilities. These questions include what is described as "national payments mechanism" and Electronic Funds Transfer Systems (EFTS). Because of the character of ICBI's membership, it is believed that the brief which *amicus curiae* proposes to file will contain a more complete response to the "EFTS" contentions of petitioner than the response of the State Commissioner of Banks and Trust Companies which, it is

anticipated, will focus on the anti-branching provisions of the Illinois banking laws.

Respectfully submitted,

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is attached as Appendix A of the Petition. The opinion of the United States District Court for the Northern District Court of Illinois is attached as Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether off-premises electronic bank facilities known as Customer Banking Communication Terminals (CBCT's) are branch banks within the meaning of the National Bank Act, 12 USC § 36(f).

STATUTES INVOLVED

The pertinent Federal and Illinois statutes are accurately described in the Petition and are set forth in full in Appendix C thereof.

STATEMENT

This case involves off-premises electronic bank facilities known as Customer Bank Communication Terminals (CBCT's) which the Court of Appeals held to be branch banks within the meaning of that portion of the National Bank Act known as the McFadden Act, 12 USC §36(f). Off-premises CBCT's, whether manned or unmanned, are electronic devices which permit a bank's customer to effect a number of transactions typically accomplished at the bank's home office. By insertion of a plastic card into the device, the customer may (i) withdraw cash from his checking or savings account; (ii) obtain loans on a credit card account; (iii) deposit checks or cash to his checking or savings account; (iv) transfer funds between checking and savings accounts; (v) make payments on installment loans, credit card charges and certain utility bills.

On June 20, 1975, the Illinois Commissioner of Banks and Trust Companies ("Commissioner") sued to enjoin the petitioner, Continental Illinois National Bank & Trust Company of Chicago ("Continental") from operating and maintaining off-premises CBCT's, contending that they are branches under 12 USC §36 (f), and thus prohibited to

national banks in Illinois under 12 USC §36 (c) and §6 of the Illinois Banking Act (Ill. Rev. Stat. 1975, Ch. 16½, §106). A similar action was subsequently commenced by the Commissioner against the First National Bank of Chicago ("First National"). The two cases were consolidated for opinion in both the District Court and the Court of Appeals.*

In its opinion, the District Court held that off-premises CBCT's, manned or otherwise, are not branch banks insofar as the cash withdrawal and bill payment functions are concerned, but are illegal branches insofar as the deposit, loan or transfer functions are concerned. On appeal and cross appeal, the United States Court of Appeals for the Seventh Circuit held that all of the functions of the off-premises CBCT's constitute branches under section 36(f) of the McFadden Act, and are therefore illegal to national banks in Illinois under section 36(c) of that Act.

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* First National, on July 9, 1976, petitioned this Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in these consolidated cases. That Petition is before this Court as No. 76-17. To avoid duplication effort and expense, we respectfully ask the Court to consider this amicus brief in conjunction with the petition of First National. There, too, consent for the amicus brief was obtained from respondent but refused by petitioner.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THIS CAUSE RAISES NO ISSUE OF FEDERAL LAW WHICH HAS NOT PREVIOUSLY BEEN SETTLED BY THIS COURT.

INTRODUCTION

If there is one subject on which the decisions of this Court have provided particularly clear and consistent guidance, it is branch banking. Mr. Justice Clark's opinion for a unanimous Court in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), which traced the legislative history of the McFadden Act as it relates to branch banking, was specifically followed three years later in *First National Bank in Plant City* v. *Dickenson*, 396 U.S. 122, 131 (1969). Four years later, Mr. Justice Clark (sitting by designation in the Eighth Circuit) again addressed the subject in *Driscoll* v. *Northwestern National Bank*, 484 F.2d 173 (1973), a decision cited and quoted by the Court of Appeals for the District of Columbia in *I.B.A.A.* v. *Smith*, 534 F.2d 921 (D.C. Cir. 1976). The latter decision, a masterful analysis by Judge Wilke of section 36 of the McFadden Act as it relates to CBCT's, was relied upon heavily by the Seventh Circuit opinion in the instant case.

Because the question of what constitutes branch banking is one of federal, rather than state, law and because that question has been so clearly addressed by this Court in *Walker Bank* and *Plant City*, the decisions of the lower federal courts have been remarkably consistent. No doubt, too, the guiding hand of Mr. Justice Clark has contributed

to this continuity. The end result is that the Petition now before this Court, notwithstanding petitioner's efforts to the contrary, presents no novel question of law upon which this Court has not heretofore spoken with clarity, and fails to demonstrate any need to resolve conflicting or inconsistent decisions among the circuits.

To the extent that the Petition does present issues of substance, those are entirely questions of legislative policy wholly within the province of the Congress.

A. NEITHER THE NATIONAL PAYMENTS MECHANISM NOR ELECTRONIC FUND TRANSFER SYSTEMS (EFTS) IS AN ISSUE IN THE INSTANT CAUSE.

In an apparent effort to broaden the issues, petitioner would have this Court believe that the future of what is characterized as the national payments mechanism and its technological implement (EFTS) hinges on the outcome of this case. Petitioner suggests that unless off-premises electronic banking facilities are permitted by judicial decree, even in states such as Illinois which prohibit such forms of branch banking, (a) the participation of national banks in the "new electronic payments mechanism" might be foreclosed or restricted, (b) banks will be prevented from competing effectively against their nonbank competitors, and finally, (c) significant technical advances such as EFTS might be "chilled" before their effectiveness can be evaluated. In truth, these considerations are not even remotely at stake in the instant cause. But even if they were, they would have no bearing on the single issue presented by this case: Whether CBCTS's are branch banks within the meaning of section 36(f).

Petitioner would arrogate unto itself the prerogatives which Congress deemed worthy of a national study commission. In 1970, the Congress established the National Commission on Electronic Fund Transfers, whose membership includes the Comptroller of the Currency, representatives of other Federal agencies, representatives of the financial and business community, individuals representing the public and officials from state agencies which regulate banks and similar financial institutions. 12 USC § 2401 *et seq.* The Commission, appointed in 1975, has the responsibility to:

> "Conduct a thorough study and investigation and recommend appropriate administrative action and *legislation necessary* in connection with the possible development of public or private electronic fund transfer systems, ..." (Emphasis added.)

Petitioner would pre-empt the work of the Commission by placing national banks in control of the relationship of EFTS to the national payments mechanism. As the Court of Appeals for the District of Columbia observed in *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921 (D.C. Cir. 1976) at 951, "such a *fait accompli* is hardly in the public interest." Clearly then, the role that national banks are to play in electronic funds transfer systems and the relationship of EFTS to the "national payments mechanism" are questions for the National Commission and the subject of possible amendatory legislation, not an issue for judicial resolution.

Petitioner maintains that unless it is permitted to operate electronic banking facilities outside its main bank office, it will be competitively disadvantaged insofar as other financial, and nonfinancial institutions are concerned.

The "competitors" include savings and loan associations, credit unions, and national credit card companies. Whatever the merit of this thesis, it too is beside the point. The McFadden Act, the construction of which presents the only possible issue for review, does not in its language or in its history express concern for the competitive position of national or state banks *vis-à-vis* other financial and non-financial institutions. Its purpose, as articulated by this Court in *Plant City* and *Walker Bank* is to assure competitive equality between national *banks* and state *banks* with respect to branch banking activities. 396 U.S., at 131-132; 385 U.S., at 261. Whatever the concern may be regarding the competitive position of national banks *vis-à-vis* other institutions, it is beyond the purview of the McFadden Act and may not be employed to sanction otherwise unlawful branching activities by national banks.

B. THE McFADDEN ACT IS INTENDED TO PROMOTE COMPETITIVE EQUALITY BETWEEN NATIONAL BANKS AND STATE BANKS ONLY INSOFAR AS BRANCH BANKING IS CONCERNED.

As the next variation on its theme of issue expansion, petitioner maintains that "a holding that electronic terminals are branches for national banks significantly affects all national banks and the national banking system irrespective of the branch requirements, and the branch status of electronic terminals for state-chartered banks under the law of the state where the terminals are located." (Petition, p. 8.) This is so, we are told, because federal banking laws impose minimum capital and branch application requirements upon all facilities of national banks deemed to be branches under federal law. 12 USC sections 36(d) and 51. Therefore, the argument continues, in a state where CBCT's are not branches for state banks, or where no branch restrictions are imposed upon CBCT's of state

banks, the Federal minimum capital and branch application requirements would apply to CBCT's operated by national banks if they are deemed to be branches under Section 36(f) of the McFadden Act. The complaint, if we understand it correctly, is that this runs contrary to the policy of competitive equality embodied in the McFadden Act.

The difficulty with petitioner's tortuously-reasoned complaint in this regard is that it is beyond the scope of judicial remedy. It is simply inherent in the McFadden Act's adherence to the dual banking system.

This Court, in both *Walker Bank* and *Plant City*, observed that the basic policy of the McFadden Act is to insure that the national and state banking systems be permitted to coexist and, insofar as branch banking is concerned, to compete with each other on equal terms. Despite this basic policy objective, perfect symmetry or equality between national and state banks is not obtainable because of the dual nature of the systems. There are inherent differences. The capital requirements for national and state banks happen to be one of those areas in which states may permit some competitive advantage for their banks, since the capital requirements of the McFadden Act apply only to national banks.

With respect to CBCT's, for example, whether branches or not under state law, the state minimum capital requirements either could not apply at all (i.e., where CBCT's are not branches under state law), or could be less than the federal minimum capital requirements (i.e., where CBCT's are branches under state law). However, since "perfect equality" between national and state banks cannot be accomplished in a dual banking system, no transgression of the McFadden Act policies is involved. As

the court in *Independent Banker's Association of America* v. *Smith, supra,* concluded:

> "[T]his is not some new source of inequality threatening to disrupt the competitive balance between our state and federal banking systems. Since the McFadden Act's passage in 1927, it has always been possible for the states to create some competitive advantages for state bank branches (CBCT's or otherwise) in the area of capitalization requirements. And, as the comptroller notes, 'in other non-branching areas, national banks enjoy competitive advantages.' Notwithstanding these imperfections, the dual banking system has endured, and we see no reason to disturb that part of the system where state law still reigns supreme." *IBAA* v. *Smith, supra,* at 950.

In a related argument asserting "competitive inequality," petitioner suggests that if CBCT's are "branches" under Federal law, then in a state which prohibits branch banking but permits CBCT's as not being "branches," CBCT's could not be operated by national banks even though state banks were permitted to do so.

Petitioner's argument is simply wrong. Under section 36(c) of the McFadden Act and consistent with its policy objectives, the national banks are free to pursue activities authorized by state law to state banks, whether those activities constitute "branching" under state law or not. *IBAA* v. *Smith, supra,* at 948-950. Section 36(c) authorizes a national banking association to operate new branches within a state if the law of that state expressly permits such activity, regardless whether the state law considers the activity branching or not. 12 USC Section 36(c); *IBAA* v. *Smith, supra,* at 948-950.

C. THE STATE OF ILLINOIS PROHIBITS BRANCH BANKING TO ITS STATE-CHARTERED BANKS.

Alleging competitive disadvantages at the hands of state chartered banks in Illinois, petitioner urges that the federal definition of "branch" contained in the McFadden Act be construed in accordance with what petitioner deems to be the competitive realities in Illinois irrespective of the Act's clear and unmistakable language to the contrary.[1] Thus, petitioner urges that it be permitted to operate off-premises electronic banking facilities despite Illinois' statutory prohibition that:

> "No bank shall establish or maintain more than one banking house or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in this, or any other state of the United States, any branch bank, nor shall it establish or maintain in this State any branch bank or additional office or agency for the purpose of conducting any of its business." Ill. Rev. Stat. Ch. 116½, Section 106.

In this request, petitioner contends that the Commissioner, at least by implication, has permitted state banks to engage in similar activities. Petitioner argues that the doctrine of competitive equality requires that it be permitted to operate its off-premises electronic banking facilities because the Illinois Commissioner, as a matter of administrative practice, has authorized state banks to engage in similar activities. Such an argument ignores the

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[1] Section 36(f) contains a broad definition of "branch" which clearly encompasses CBCT's:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office or branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

clear language of Section 36(c) of the McFadden Act and, as a consequence, misapprehends the relationship between Federal and state law on the question of branch banking. Section 36(c) authorizes national banks to engage in branch banking *only* if similar activities are permitted to state banks "*by the statute law of the state in question by language specifically granting such authority affimatively and not by implication or recognition.*" 12 USC § 36(c). In reaching this determination, state law controls and administrative practice or interpretation are irrelevant. *First National Bank of Fairbanks* v. *Camp,* 465 F.2d 586, 595 (D.C. Cir. 1972).

Moreover, petitioner's representation that the Illinois Commissioner has authorized such off-premises banking activities similar to those proposed by petitioner is an error. (See District Court Opinion, petitioner's Appendix, pp. 35-36.) Particularly, with respect to what is described as the Moneymatic 365 System, the record clearly shows that the Illinois Commissioner has in no way approved that operation, nor has his approval been sought at any time. Indeed, as his deposition discloses, he first learned of its existence during this litigation. This hardly constitutes administrative approval, tacit or otherwise, of such a system.

Apparently conceding that Illinois does not permit branch banking, either in law or in fact, petitioner next contends that state banks in Illinois may engage in any activity permitted national banks, and that accordingly competitive equality will be maintained even if petitioner is allowed to operate its off-premises CBCT's. This argument is bold, novel, at odds with the language of Section 5(11) of the Illinois Banking Act and completely contrary to the entire thrust of the McFadden Act.

First, section 5(11) of the Illinois Banking Act does not say, as petitioner maintains, that "Illinois State Banks shall have all powers of national banks" notwithstanding any other provision of the Illinois Banking Act. In pertinent part, Section 5(11) provides:

> "A bank organized under this Act . . . shall . . . have all the powers conferred by this Act and the following additional general corporate powers:
>
> • • •
>
> (11) Notwithstanding any other provisions of this Act, to do any Act and to own, possess, and carry as assets property of such character, including stock, which is at the time authorized or permitted to National Banks *by an Act of Congress* and subject always to the same limitations and restrictions as are applicable to National Banks by the pertinent Federal law." (Emphasis supplied.)

Thus, section 5(11) does not allow state banks in Illinois to perform any act *performed* by a national bank, but authorizes state banks to perform only those acts *specifically authorized* to national banks by an Act of Congress. Of course, the McFadden Act authorizes national banks to engage in branch banking only when, where, and to the extent state banks are permitted to do so under state law. Clearly then, petitioner's reading of Section 5(11) is in error.

More importantly, the construction of Section 5(11) urged by petitioner would undermine the entire thrust and purpose of the McFadden Act. The language and history of that Act,[2] as well as this court's opinions in *Walker Bank* and *Plant City,* express a policy that the state law is to be preeminent on the question of branch

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[2] See, *Walker Bank,* 385 U.S. at 256, 260; *IBAA* v. *Smith, supra,* at 930-932.

banking. This is assured through the device of incorporating state statutory provisions via section 36(c) of the McFadden Act. Petitioner's contention would override this statutory mandate by permitting national banks to assume the lead on when, where, and to what extent branch banking is to be permitted on the state level.

Finally, petitioner's construction of Section 5(11), standing alone and without regard to the McFadden Act, is expressly contrary to the prohibition against branch banking contained in section 6 of the Illinois Banking Act. The likelihood that the Illinois Courts would adopt such an interpretation of section 5(11), is, we submit, nonexistent. Elementary rules of statutory construction suggest that inconsistent interpretations are not favored, and that, wherever possible, a statute is to be construed consistent with its purpose and so as to give meaning to all of its sections.

D. OFF-PREMISES CUSTOMER BANK COMMUNICATION TERMINALS (CBCT'S) ARE BRANCHES WITHIN THE MEANING OF SECTION 36(f) OF THE McFADDEN ACT.

The threshold determination in any branch banking controversy is whether the off-premises facilities owned and operated by a national bank are "branches" within the meaning of the McFadden Act. While the Act incorporates state law in determining when, where and to what extent branches may be permitted, the ultimate question of what constitutes the branch is a federal one. *First National Bank in Plant City* v. *Dickenson,* 396 U.S. 122 (1969); *First National Bank* v. *Walker Bank & Trust Co.,* 385 U.S. 252 (1966).

The term "branch" is defined in section 36(f) of the McFadden Act and includes any branch bank or additional

office "at which deposits are received or checks paid, or money lent." According to Representative McFadden's own understanding of the intent of the section, the term branch also includes any place outside or away from the main bank office where the bank is "transacting any business carried on at the main office." 68 Cong. Rec. 5816 (1927).

As we have seen, the CBCT's here in issue are off-premises electronic facilities which permit a bank customer to withdraw cash from his checking or savings account, obtain loans or "cash advances" on credit card accounts, deposit checks or cash to his checking or savings accounts, transfer funds between checking and savings accounts and pay installment loans, credit card charges, and certain utility bills.

To avoid the obvious parallel between the functions performed by CBCT's and the functions encompassed within the definition of branch contained in the McFadden Act, petitioner offers a host of narrow, technical arguments. Thus, we are told that CBCT's do not cash checks because no negotiable instrument is involved, that they do not receive deposits because a deposit does not become such until received and verified at the main bank office, and that loans are not made by CBCT's because the "loan agreement" between the bank and its customer is negotiated and signed at another time and place.

Rejecting these arguments as exalting form over substance the Court of Appeals for the District of Columbia in *IBAA* v. *Smith, supra,* carefully analyzed each of the transactions performed by CBCT's from a functional standpoint and concluded that they fell within the federal definition of branch. That analysis will not be repeated here. We respectfully refer this Court to the *IBAA* deci-

sion. When analyzed functionally, there can be no doubt that off-premises CBCT's are additional offices at which deposits are received, checks paid and money lent within the meaning of section 36(f) of the McFadden Act. Only by the most strained analysis of the functions performed by CBCT's can this conclusion be avoided. In fact, it was precisely such a form over substance argument which this court expressly rejected in *Plant City*, 396 U.S. at 137.

What the petitioner seeks here through the operation of off-premises electronic banking facilities is to obtain a competitive advantage not shared in by state-chartered banks in Illinois. Additionally, petitioner desires to implement a state-wide Electronic Funds Transfer System (EFTS) before the National Commission on Electronic Funds Transfer completes its investigation and study of this new phenomenon. Most significantly, however, petitioner's objective would tilt the delicate balance between national and state banks in our dual banking system by undermining the state's leadership role therein. No one has captured this facet of the case better than Judge Wilke in *IBAA* v. *Smith, supra,* at 936, who observed:

> "If a state has historically chosen not to allow branch banking because of a general fear of 'bigness' and large concentrations of power, there is every evidence that the Congress and the Supreme Court regard this decision as the State's prerogative. A state which generally opposes 'big banks' may foresee developments along this line: First, the larger banks will be able to afford more CBCT's than their smaller competitors. Then, the added convenience of these extra CBCT's will attract old and new customers away from the smaller banks. The end result will be fewer banks. More 'big' banks and less competition in the financial sector. Hence, a state that favors vigorous

competition by many small banks may nevertheless be forced to submit to less competition and larger banks in order to maintain a viable state banking system. This frustration of state policy was not the intent of Congress in the National Bank Act nor the intent of the Supreme Court in *Walker Bank* and *Plant City*. Properly construed, the National Bank Act and the policy of competitive equality leave to the states the question of branching and its inherent advantages and disadvantages."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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